

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

GARY D. KENISON,)	CASE NO. C05-0737-TSZ-MAT
)	
Plaintiff,)	
)	
v.)	REPORT AND RECOMMENDATION
)	
JO ANNE B. BARNHART, Commissioner)	
of Social Security,)	
)	
Defendant.)	
_____)	

Plaintiff Gary D. Kenison proceeds through counsel in his appeal of a final decision of the Commissioner of the Social Security Administration (Commissioner). The Commissioner denied plaintiff's application for Supplemental Security Income (SSI) disability benefits under Title XVI, 42 U.S.C. § 1383(c)(3) after a hearing before an Administrative Law Judge (ALJ). Having considered the ALJ's decision, the administrative record (AR), and all memoranda of record, it is recommended that the decision be affirmed in part and reversed in part, and remanded for additional testing related to plaintiff's possible mental impairments and the impact of his medications on his functional capacity.

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FACTS AND PROCEDURAL HISTORY

Plaintiff was born on XXXX, 1950.¹ He completed high school and attended college for some period of time, leaving before earning a degree. (AR 19.) Plaintiff previously worked as a mail carrier and construction worker, with a lengthy history of non-employment prior to his application for SSI benefits. (AR 24-25.)

Plaintiff applied for SSI benefits on February 11, 2002, alleging a compression fracture of the spine and osteoporosis, with an alleged onset date of April 23, 2001. (AR 74.) The claim was denied initially and on reconsideration. Upon a timely request, a hearing was held on April 8, 2004 before ALJ Verrell Dethloff, with testimony taken from plaintiff and impartial medical expert Michael Powell, Ph.D. (AR 280-303.) The ALJ issued a decision on June 24, 2004 denying plaintiff benefits. (AR 15-27.) Plaintiff appealed to the Appeals Council, which declined to review his claim. (AR 6-9.) Plaintiff appealed this final decision of the Commissioner to this Court.

JURISDICTION

The Court has jurisdiction to review the ALJ's decision pursuant to 42 U.S.C. § 405(g).

DISCUSSION

The Commissioner follows a five-step sequential evaluation process for determining whether a claimant is disabled. *See* 20 C.F.R. §§ 404.1520, 416.920 (2000). At step one, it must be determined whether the claimant is gainfully employed. The ALJ found plaintiff not gainfully employed since the alleged onset date. At step two, it must be determined whether a claimant

¹ Plaintiff's date of birth is redacted back to the year of birth in accordance with the General Order of the Court regarding Public Access to Electronic Case Files, pursuant to the official policy on privacy adopted by the Judicial Conference of the United States.

suffers from a severe impairment, which is defined as either a medically determinable impairment or a combination of impairments which significantly limit an individual's physical or mental ability to do basic work activities. 20 C.F.R. § 416.920, Social Security Ruling 96-4p. The ALJ found that plaintiff's degenerative disc disease and osteopenia were severe impairments. Step three asks whether a claimant's impairments meet or equal a listed impairment. The ALJ found that plaintiff's impairments did not meet or equal a listed impairment. If a claimant's impairments do not meet or equal a listing, the Commissioner must assess residual functional capacity (RFC) and determine at step four whether the claimant has demonstrated an inability to perform past relevant work. The ALJ assessed plaintiff's RFC and found that he could not perform his past relevant work. If a claimant demonstrates an inability to perform past relevant work, the burden shifts to the Commissioner to demonstrate at step five that the claimant retains the capacity to make an adjustment to work that exists in significant levels in the national economy. The ALJ found that plaintiff was capable of performing the full range of light work, and therefore a finding of "not disabled" was directed by the Medical-Vocational Guidelines.

This Court's review of the ALJ's decision is limited to whether the decision is in accordance with the law and the findings supported by substantial evidence in the record as a whole. *See Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir. 1993). Substantial evidence means more than a scintilla, but less than a preponderance; it means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Magallanes v. Bowen*, 881 F.2d 747, 750 (9th Cir. 1989). If there is more than one rational interpretation, one of which supports the ALJ's decision, the Court must uphold that decision. *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002).

01 Plaintiff contends that the ALJ failed to properly evaluate his psychological impairments
02 and the impact of his medications on his functional capacity. He argues that the ALJ improperly
03 discounted the findings of his treating doctor and the State's examining medical expert, and relied
04 instead on the testimony of Michael Powell, Ph.D., the impartial medical expert who testified at
05 the hearing. Plaintiff urges that the ALJ failed to fully develop the administrative record by
06 ordering a consultative examination in response to Dr. Powell's hearing testimony. Plaintiff also
07 assigns error to the ALJ's evaluation of his credibility, and to the use of the Medical-Vocational
08 Guidelines to find him not disabled at step five. The Commissioner asserts that the ALJ provided
09 specific and legitimate reasons for giving greater weight to Dr. Powell's testimony, and correctly
10 determined that plaintiff's narcotic medications did not impose significant work-related limitations.
11 The Commissioner takes the position that there was no need for further record development, that
12 plaintiff's credibility was properly assessed, and that the step five finding was supported by
13 substantial evidence.

14 Mental Impairments

15 When asked at the hearing why he was not working, plaintiff answered that he was not
16 physically able to work, and was having "a problem with my memory." (AR 284.) When
17 questioned by his attorney, he described various emotional problems, including difficulties with
18 decision-making, organization, irritability, ability to concentrate, and fatigue. (AR 289-291.) In
19 response to a question by Dr. Powell about his psychological problems, plaintiff said:

20 Well, I think—it's something that I've—I kind of hate to admit that I have, you know,
21 and so I try to, you know, look at it like maybe other people might have the same
22 problems.

(AR 295.)

01 Dr. Powell, in response to the ALJ's question as to plaintiff's primary psychological
02 impairment, stated: "I don't know. It seems like we need more psychological data." (AR 299.)
03 Dr. Powell went on to testify that, while he did not see justification in the record for the diagnoses
04 of Cognitive Disorder Not Otherwise Specified (NOS) or Post-Concussive Disorder by examining
05 psychologist Dr. Silvio Arenas, he did feel plaintiff had memory scale problems related to long
06 term narcotic use. (AR 300.) Also, he agreed with the Mood Disorder NOS diagnosis, although
07 he noted mild rather than major depression, and some, albeit not very serious, problems with
08 anxiety. (AR 300-01.) Finally, Dr. Powell testified, in reference to the opinions of Dr. Arenas'
09 and the treating providers at Community Mental Health Program:

10 I'm not saying that they aren't right, I'm just saying I don't think there's enough
11 supporting evidence. And if it's important that he has some psychological diagnoses,
12 I would suggest further testing to include an MMPI and MCMI, some interviewing,
some kind of narrative justification for whatever the diagnosis is, along with scores
from those tests.

13 (AR 301.)

14 The ALJ found plaintiff had severe physical impairments, but did not find any mental
15 impairments. He did address the issue of mental impairment, adopting Dr. Powell's assessment
16 of the opinions of Dr. Arenas as internally inconsistent and lacking justification. Unfortunately,
17 critical portions of Dr. Powell's opinion in this regard were inaudible and, therefore, not
18 transcribed. (*See, e.g.*, AR 299-301.) Furthermore, the ALJ did not accurately describe plaintiff's
19 testimony regarding his emotional problems:

20 At the hearing, when asked whether he had emotional problems, the claimant replied
21 only that he "didn't like the position that [he] was in." While he admitted feeling
22 depressed "at times," he testified that he tried to keep upbeat. He also testified that
he was not taking any medication for any alleged mental symptoms, and had not been
to counseling for five years. Finally, when asked whether, in his opinion, he has

01 psychological problems, the claimant replied, "not at this time."

02 (AR 21 (emphasis added.)) The ALJ is correct in noting that, when asked if he had emotional
03 problems, plaintiff testified: "Well, yes. I mean, I certainly don't like the, you know, like the
04 position that I'm in. So I mean, yes, you know, yes, I am experiencing some emotional problems."

05 (AR 289.) However, the ALJ fails to reference or discuss the remainder of plaintiff's testimony
06 about his difficulties with decision-making, organization, irritability, ability to concentrate and
07 fatigue. (See AR 289-91.) In fact, the ALJ made no inquiry whatsoever about plaintiff's mental
08 or psychological problems. (See AR 284.) Instead, plaintiff's attorney elicited all such testimony.

09 From a review of the record, Dr. Powell's criticism of Dr. Arenas' report is well taken.²
10 Dr. Arenas' conclusions ("a number of now severely dysfunctional neurophysical, neurocognitive,
11 and neuroaffective (emotional) symptoms . . . which have led to an inability to hold a job . . . major
12 depressive features... severe mental impairment") appear out of proportion to actual test scores
13 within the mild range, indicating generally mild symptoms with only mild depressive features. (See
14 AR 249-56.) The ALJ gave appropriate reasons for disregarding the opinions of Dr. Arenas,
15 noting that Dr. Arenas examined plaintiff several years after he had last complained to any
16 treatment provider about mental health symptoms. (AR 21.) Plaintiff testified he was not taking

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18 ² However, the ALJ's suggestion that the opinion of a State agency examining expert
19 should be given "no weight" because it is "a purely litigation exercise, deriving from the benefit
20 to be accorded the State of Washington if the SSI facilitator who referred him, at his attorney's
21 request, if claimant were to be moved from the State to the Federal welfare rolls" is contrary to
22 law and an impermissible basis for disregarding the opinion. 20 C.F.R. § 416.927(f)(2)(I) acknowledges: "State agency medical and psychological consultants and other program physicians and psychologists are highly qualified physicians and psychologists who are also experts in Social Security disability evaluation. Therefore, administrative law judges must consider findings of State agency medical and psychological consultants or other program physicians or psychologists as opinion evidence, except for the ultimate determination about whether you are disabled."

any medication for any alleged mental symptoms and had not been to counseling for five years. (AR 294-95.) *Cf. Burch v Barnhart*, 400 F.3d 676, 681 (9th Cir. 2005) (ALJ may consider lack of treatment in making a credibility determination). The ALJ also noted that Dr. Arenas' opinion regarding plaintiff's Global Assessment of Functioning score was inconsistent with plaintiff's own report of his activities.

However, the ALJ's assessment of plaintiff's mental impairments was deficient with regard to the impact of his medications on his functional capacity. While Dr. Powell did state his disagreement with some of the conclusions reached by Dr. Arenas, Dr. Powell also testified that the one area where plaintiff appeared to have his greatest difficulty, the WMS-III memory test, indicated a "classic side effect" of long-term narcotic use. (AR 300.) He recommended further testing "if it's important that he has some psychological diagnoses." (AR 301.)

While it is true that plaintiff has the burden of proof in establishing disability in steps one through four of the sequential analysis, it is also correct that the Social Security Administration is "perhaps the best example" of an agency that is not adversarial in nature. *Sims v. Apfel*, 530 U.S. 103, 110 (2000). "It is the ALJ's duty to investigate the facts and develop the arguments both for and against granting benefits." *Id.* at 111. While the ALJ adopted Dr. Powell's opinion insofar as its criticism of Dr. Arenas' report, the ALJ failed to follow the psychologist's opinion that further testing should be conducted. Therefore, this matter should be remanded to direct the ALJ to obtain further testing relating to possible mental impairments, including the impact of plaintiff's medications on his functional capacity.

Treating and Examining Source Opinions

In general, more weight should be given to the opinion of a treating physician than to a

01 non-treating physician, and more weight to the opinion of an examining physician than to a non-
02 examining physician. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1996). Where not contradicted
03 by another physician, a treating or examining physician's opinion may be rejected only for "clear
04 and convincing" reasons. *Id.* (quoting *Baxter v. Sullivan*, 923 F.2d 1391, 1396 (9th Cir. 1991)).
05 Where contradicted, a treating or examining physician's opinion may not be rejected without
06 "specific and legitimate reasons' supported by substantial evidence in the record for so doing."
07 *Id.* at 830-31 (quoting *Murray v. Heckler*, 722 F.2d 499, 502 (9th Cir. 1983)). Where the opinion
08 of the treating physician is contradicted, and the non-treating physician's opinion is based on
09 independent clinical findings that differ from those of the treating physician, the opinion of the
10 non-treating physician may itself constitute substantial evidence. *See Andrews v. Shalala*, 53 F.3d
11 1035, 1041 (9th Cir. 1995). It is the sole province of the ALJ to resolve this conflict. *Id.* A
12 treating doctor's opinion, while generally accorded the greatest weight, is not binding on an ALJ
13 with respect to either the existence of an impairment or the ultimate question of disability. *Ukolov*
14 *v. Barnhart*, 420 F.3d 1002, 1004 (9th Cir. 2005).

15 Plaintiff asserts that the ALJ failed to give proper weight to the opinion of his treating
16 physician, Dr. Joy Fackenthall, that he was severely limited in his functional capacity. Plaintiff
17 takes issue with the greater weight assigned to the opinion of Dr. Guthrey Turner, Jr., a State
18 agency physician.

19 In discussing Dr. Fackenthall's opinion, the ALJ wrote:

20 The claimant's treating physician at Sea Mar opined on August 21, 2001, that the
21 claimant was "severely limited," meaning he was unable to lift at least two pounds or
22 unable to stand and/or walk" due to severe back pain which allegedly limited his range
of motion. Her opinion did not change in October, 2001, or March, 2002, but she did
note "improvement with medications" on both occasions.

01 The undersigned finds these evaluations inconsistent with examination findings,
02 contradicted by reports of the claimant's activities throughout the record, and lacking
justification.

03 . . .

04 . . . Dr. Fackenthall's opinions flie [sic] in the face of claimant's presentation at all
05 medical examinations in the record and are so exaggerated as to beg credulity.

06 Findings made upon examination of the claimant are inconsistent with the treating
07 physician's severely limited functional assessment. Upon examination by a pain clinic
08 in June, 2002, the claimant had only mild adult kyphosis, with some tenderness and
09 mildly decreased back flexion. The claimant was able to touch the floor, do a push-up
against the wall with resistance, and do simple rolling maneuvers. At no time during
the examination did the claimant have any radiation of his pain, and the pain remained
localized to his mid-thoracic paravertebral area. Ultimately, conservative treatment
was recommended.

10 The claimant's own reported activities, many recorded in the treating physician's own
11 medical notes, contradict her assessment of severe limitation of functionality. The
12 claimant reported that his pain was improved after physical therapy, and that his
13 activity level was greatly improved with medication. The claimant's treating physician
14 agreed with the claimant when she opined in November, 2003, that the claimant
showed "significant improvement with being on a pain medication." As outlined
below, notes from the claimant's treating physician report that after his alleged onset
of disability, the claimant was shoveling snow, chasing a bat around the house,
traveling, doing yard work, and taking care of his mother.

15 Additionally, the forms containing the treating physician's assessment did not provide
16 adequate justification. The treating physician's severely limited assessment was
17 expressed through a check off form with no more than generalized comments. This
assessment is also contradicted by the assessment of Disability Determination
Services.

18 (AR 23-24 (internal citations to record omitted.))

19 An ALJ may discredit opinions of a treating doctor that are conclusory, brief, and
20 unsupported by the record as a whole or by objective medical evidence. *Batson v. Commissioner*
21 *of Soc. Sec. Admin.* , 359 F.3d 1190, 1195 (9th Cir. 2004). Here, the ALJ provided specific
22 reasons for not crediting the opinion of Dr. Fackenthall, noting that the limitations imposed by the

01 doctor were contradicted by the doctor's own findings and plaintiff's activities (shoveling snow,
02 running, jumping, traveling, doing yard work, and taking care of his mother), were so extreme as
03 to be implausible ("[u]nable to lift at least 2 pounds or unable to stand and/or walk" (AR 188)),
04 were set forth in a check-off form without explanation (the only explanation was the redundant
05 comment "Severe back pain significantly limits range of motion" (*id.*)), and were contradicted by
06 Dr. Turner, the state agency reviewing physician, who noted the lack of objective findings to
07 corroborate the opinion of the treating doctor (*see* AR 235-236). The ALJ also noted the
08 contradiction between the treating doctor's assessment and that of examining physicians Dr. Karro
09 and Dr. Goodman at the Multidisciplinary Pain Center. (*See* AR 23, 216-219.) Accordingly, the
10 undersigned concludes that the ALJ gave appropriate weight to the opinion of Dr. Fackenthall,
11 and that the stated reasons for disregarding her opinions are supported by substantial evidence.

12 Credibility

13 Plaintiff argues that the ALJ did not properly evaluate his credibility as to his physical
14 capacity. The ALJ must give specific, convincing reasons for rejecting the subjective statements
15 of a Social Security disability claimant. *Tonapetyan v. Halter*, 242 F.3d 1144, 1148 (9th Cir.
16 2001). Here, in discussing plaintiff's testimony, the ALJ found as follows:

17 At the hearing, the claimant also assessed his functionality. He alleged that he could
18 only sit for 20 minutes, stand for 10 minutes, and could not walk even one half of a
19 mile. While the claimant testified that driving, washing dishes and using his computer
aggravated his back pain, he had no trouble washing his laundry.

20 This subjective assessment is not consistent with the claimant's reported activities
21 throughout the record. In March, 2002, the claimant reported that he was shoveling
22 snow. In October 2002, he was running around and jumping up and down in an
attempt to get a bat out of his mother's house, and was planning a trip to Oregon. In
November, 2003, he reported that his pain medications allowed him to "function quite
a bit at home," including performing yard work and "helping his mother out." The

01 claimant was also able to travel at Thanksgiving that same year. Claimant has no
02 credibility in his representations of disability. An additional detriment to his credibility
is his lack of an [sic] work record since 1988.

03 (AR 24 (internal citations to record omitted.))

04 Plaintiff points to references in the record showing the impact of particular physical
05 activities. After shoveling snow, he saw his doctor for treatment, reporting difficulty getting up.
06 (AR 164.) That same chart note, however, shows plaintiff told the doctor that the back pain was
07 not worsening, and did not have a radicular component. (*Id.*) Several months later, the “bat
08 incident” occurred, described in the doctor’s chart notes as the plaintiff “using a sheet and running
09 around, jumping up and down, he may have hit his side along a dresser. He was waving his arms
10 quite a bit.” (AR 160.) Contrary to plaintiff’s assertion, he did not report to the doctor with
11 “severe right chest wall pain” (*see* Dkt. 13 at 21), but, instead, with “an ache on the right side of
12 his chest wall.” (AR 160.) Also, the chart notes indicate plaintiff came in to see the doctor
13 because he was “planning on traveling down to Oregon tomorrow and was wondering if this is
14 something he needs to be concerned about[,]” and that the diagnosis was “probable chest wall
15 strain.” (*Id.*)

16 An ALJ may consider factors such as daily activities and work record in weighing a Social
17 Security claimant’s credibility. *Thomas*, 278 F.3d at 959. While disability claimants should not
18 be penalized for attempting to lead normal lives in the face of their limitations, a level of activity
19 inconsistent with claimed limitations has a bearing on the claimant’s credibility. *Reddick v. Chater*,
20 157 F.3d 715, 722 (9th Cir. 1998). An ALJ’s credibility finding will not be second-guessed by a
21 reviewing court if supported by substantial evidence. *Id.* *See also Light v. Social Sec. Admin.*,
22 119 F.3d 789, 792 (9th Cir. 1997). Moreover, the Commissioner’s findings in the course of

01 denying disability benefits are upheld if supported by inferences reasonably drawn from the record,
02 and if evidence exists to support more than one rational interpretation, the court must defer to the
03 Commissioner's decision. *Batson*, 359 F.3d at 1193. In this case, the ALJ's finding as to
04 plaintiff's credibility was supported by substantial evidence and should not be disturbed.

05 **CONCLUSION**

06 The undersigned recommends that the case be AFFIRMED in part and REVERSED in
07 part, and REMANDED to the Commissioner for further administrative proceedings. On remand,
08 the ALJ should obtain further mental health testing of plaintiff, reassess his severe impairments and
09 provide specific findings and appropriate rationale for each of the functional areas in 20 C.F.R. §
10 920a (c), reassess plaintiff's RFC in light of any mental impairments, as well as the impact of his
11 medications, and re-evaluate steps three through five of the sequential evaluation process with the
12 assistance of a vocational expert and a medical consultant, if necessary. In all other respects, the
13 decision should be affirmed.

14 DATED this 29th day of November, 2005.

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16 Mary Alice Theiler
17 United States Magistrate Judge
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